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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 158.

THE B. F. GOODRICH COMPANY, *Petitioner*,

v.

UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

Cases.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The B. F. Goodrich Company, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above-entitled cause on April 13, 1943, and affirming, on different grounds, a judgment for the United States District Court for the Southern District of California, Central Division.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 285-301) is not yet reported. The opinion of the District Court (R. 95-108) is reported at 48 F. Supp. 433.[1]

JURISDICTION.

The judgment of the Circuit Court of Appeals (R. 302) was entered on April 13, 1943. This petition was filed in this Court on or before July 13, 1943 (see clerk's file mark). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and on 28 U. S. C. § 350.

STATUTES INVOLVED.

The pertinent parts of the statutes involved are set forth in the Appendix, *infra*, pp. 23-24.

STATEMENT.

The questions presented by this petition (see p. 12, *infra*) arise from the holding of the Circuit Court of Appeals that there was a fatal variance between petitioner's First Amended Petition, upon which the case was tried, and the claims for refund which petitioner submitted to the Commissioner of Internal Revenue. In so far as they bear on these questions, the facts, pleadings, proceedings on trial, and decisions of the courts below may be summarized as follows:

1. FACTS.[2] From August 1, 1933, to January 5, 1934, Pacific Goodrich Rubber Company, a wholly owned subsidiary of petitioner (R. 82, 142), manufactured and sold tires containing 705,806 pounds of processed cotton on which it paid

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[1] The District Court's findings of fact (R. 140-152) and conclusions of law (153-161) are not reported.

[2] The facts and certain of the exhibits were stipulated (R. 80-92, 159-160).

to the Collector of Internal Revenue the "floor tax" provided for by Section 16(a) of the Agricultural Adjustment Act of 1933, 48 Stat. 40, 7 U. S. C. § 616(a)[3] (R. 86-87, 143-145). In computing the manufacturer's excise tax imposed upon these tires by Section 602(1) of the Revenue Act of 1932, 47 Stat. 261, 26 U. S. C. § 3400,[4] Pacific Goodrich Company (hereafter referred to as "Pacific") deducted from the gross weight of such tires the 705,806 pounds of processed cotton on which it had paid the "floor stock" tax (cf. R. 87-88 with R. 145). In making this deduction against the excise tax, Pacific relied upon proviso of Section 9(a) of the Agricultural Adjustment Act, 48, Stat. 35, 7 U. S. C. § 609(a)[5] (R. 148, 90-91).

The Collector of Internal Revenue (John B. Carter[6]) on April 10, 1934, disallowed Pacific's deduction of the weight of the processed cotton from the gross weight of the tires in computing the excise tax, and demanded, as an additional excise tax, the sum of $15,880.64, which was arrived at by applying the rate of the excise tax to the weight of the processed cotton deducted by Pacific in its computation of the tax. In addition, a penalty of $569.74 was assessed (R. 88, 146, 93-94, 196-197). Pacific paid the additional assessment[7] and the penalty, which together totalled $16,450.39, in April and July, 1934 (R. 146-147, 89). No part of the additional

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[3] See p. 23, *infra*.

[4] See p. 24, *infra*.

[5] The proviso reads as follows: "Provided, that upon any article upon which a manufacturer's sales tax is levied under the authority of the Revenue Act of 1932, and which manufacturer's sales tax is computed on the basis of weight, such . . . sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a *processing* tax has been paid." (Italics supplied.)

[6] Mr. Carfer died prior to the commencement of the action (R. 80, 142), which, therefore, was brought against the United States.

[7] It was stipulated (R. 257) that the additional excise tax, though demanded of and paid by Pacific, was never formally assessed against it. However, for convenience' sake we shall refer to the tax as an assessment.

tax or penalty has been refunded either to Pacific or to petitioner (R. 150).

At the close of business on June 30, 1934, Pacific delivered possession of all of its assets to the petitioner as sole owner of Pacific's stock (R. 147, 93-94, 225, 227). Also on June 30, 1934, Pacific, by its President and Secretary, executed an assignment by which it assigned "to The B. F. Goodrich Company . . . all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company now has or shall have . . . " (R. 83, 148, 52, 93, 191-193). This assignment was ratified by Pacific's Board of Directors and stockholders on July 6, 1934 "as a distribution in kind of all of the assets of the corporation as a distribution in kind of all of the assets of the corporation to its stockholders, all of its issued and outstanding stock being owned and/or controlled by The B. F. Goodrich Company . . ." (R. 147, 93-94, 225, 227, 230). At the same time the stockholders directed the officers of the corporation to convey to petitioner all of Pacific's real estate (R. 147, 93-94, 225, 230-231), and to take the measures necessary to dissolve the corporation (*ibid*). Pursuant to the latter direction, Pacific was dissolved on December 21, 1934 (R. 81, 141, 93-94, 233-235). In addition, the directors of that corporation executed on behalf of the corporation an assignment, dated August 14, 1935, under the terms of which it did "sell, assign, and transfer" to petitioner "all claims, demands, choses in action or cause or causes of action of whatsoever kind" including "particularly its claims for refund of excise tax illegally paid to the United States . . . in the sum of $16,450.39" (R. 83, 148; 54-55, 93-94, 194-195).

On August 31, 1935, Pacific and petitioner each submitted a claim for refund of the additional manufacturer's excise tax which had been assessed against Pacific (see p. 3, *supra*). Both of these claims were predicated on the ground that Pacific in computing the excise tax on the tires which it sold was entitled under the proviso of Section 9 (a) of

the Agricultural Adjustment Act, *supra*, to deduct from the gross weight of the tires the weight of the processed cotton contained therein on which it had paid a "floor stock" tax under Section 16(a) of that Act, *supra* (R. 89, 148, 93-94, 199-202, 209-214). In addition, petitioner stated in its claim that it was entitled to the refund by virtue of the assignment made to it by Pacific on June 30, 1934[8] (R. 148-149, 93-94, 211-213). On April 21, 1936, both Pacific and petitioner filed amended claims which differed from the original claims only in the additional statement that Pacific had not included the taxes in the prices of the tires assessed[9] (R. 90, 149, 93-94, 203-208, 215-220). In both of their original and amended claims, petitioner and Pacific gave their address as, 5400 E. Ninth Street, Los Angeles, California (R. 199, 204, 209, 215), and petitioner's original claim as well as both of Pacific's claims were submitted by S. M. Jett as Secretary of the respective corporations (R. 201, 207, 213).

The Commissioner of Internal Revenue on April 18, 1936 rejected Pacific's original claim (see p. 4, *supra*) on the ground that Section 9 (a) of the Agricultural Adjustment Act, *supra*, did not authorize a deduction of the weight of processed cotton on which a "floor stock" tax had been paid under the Section 16 (a) of that Act, *supra*, in the computation of the excise tax imposed on tires by Section 602(a) of the Revenue Act of 1932, *supra*.[10] On May 22, 1936, the Commissioner, by letter, rejected Pacific's amended claim of April 21, 1936, for the same reason and for the additional reason that the amended claim failed

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[8] See p. 4, *supra*.

[9] The additional assessment having been paid on April 19, 1934 (cf. R. 146 with R. 202), the bar of the statute of limitations against claims for refunds (Section 1106 (a) of the Revenue Act of 1932, 47 Stat. 287, now 26 U. S. C. § 3313) fell on April 18, 1938.

[10] The Commissioner reasoned that the words "processing tax" used in the proviso (see n. 5, p. 3, *supra*) did not include within their scope the "floor stock" tax imposed by Section 16(a) (R. 223-224).

to set forth any new and material evidence. (R. 150, 93-94, 220-221, 223-224.) On the same date, the Commissioner, by a letter sent to petitioner "as successor to Pacific Goodrich Company", rejected petitioner's original and amended claim (R. 149-150, 90,[11a] 93-94, 221-222). The material part of this letter reads as follows:

> "It is stated [in petitioner's claims] that you are entitled to the refund . . . since the Pacific Goodrich Rubber Company sold, assigned, transferred and set over to you all its rights and claims. It is contended that the Pacific Goodrich Company erroneously paid manufacturer's excise tax in the amount claimed for the reason that the floor tax was paid on the cotton content of the tires in question.
>
> "There is on file in this office a claim filed by Pacific Goodrich Rubber Company for refund of the above tax, based on the same contentions. This claim is therefore a duplicate claim and is rejected in full." (R. 222.)

2. PLEADINGS AND TRIAL. On October 1, 1937, petitioner filed in the District Court its original petition (R. 2-25) for recovery of the additional excise tax assessed against Pacific (see p. 3, *supra*). This petition alleged (R. 3-5) that on June 30, 1934, petitioner had become the owner, by assignment, of "all the rights, claims and choses in action" which Pacific had at that time. In support of this allegation, Pacific's assignment of the same date was set forth[11] (R. 3-5). The petition next stated that the action instituted was one for the recovery of the manufacturer's excise tax erroneously collected from it by respondent (R. 6). The remainder of the petition contained allegations of facts designed to show that the tax had been erroneously collected from Pacific and that judgment for recovery of the tax should, accordingly, be entered against respondent (R. 6-25).

[11a] The letter of rejection is referred to in the stipulation as "plaintiff's Exhibit 'F'." However, as introduced, the letter is marked "Plaintiff's Exhibit H" (cf. R. 160 with R. 221-222).

[11] See p. 4, *supra*.

Respondent on December 3, 1937, met the petition with a demurrer which, on the assumption that the petition sought recovery of taxes paid under the Agricultural Adjustment Act, challenged the jurisdiction of the District Court under Sections 905 and 906 of the Revenue Act of 1936[12] and the sufficiency of the petition under the Sections 902, 903, and 904 of the same Act[13] (R. 28-31). On April 6, 1938, the Government amended its demurrer by adding a third ground which challenged, under R. S. § 3477, 31 U. S. C. § 203 (see p. 23, *infra*), the validity of Pacific's assignment of June 30, 1934 (see p. 4, *supra*) (R. 33-34).

After the filing of the demurrer, petitioner on May 21, 1938, amended its petition by setting forth Pacific's assignment of August 14, 1935 (see p. 4, *supra*) as an "addition to" and "a supplement of" Pacific's assignment of June 30, 1934, which it had set forth in its original petition (see p. 6, *supra*) (R. 35-37). Respondent, on August 1, 1938, demurred to the petition as amended on the same grounds set forth in its original demurrer as amended (R. 39).

The District Court on October 3, 1938, overruled the demurrer (R. 40-41), and respondent on February 3, 1939, filed its answer (R. 41-48). In its first answer and defense, respondent denied (R. 42-45) the petitioner's allegation that the suit was brought for the recovery of the manufacturer's excise tax and all petitioner's allegations going to the illegality of the tax assessed against Pacific. In its second answer and defense (R. 45-48), respondent set out as an affirmative defense that the suit was one for the recovery of taxes paid under the Agricultural Adjustment Act and that petitioner was not entitled to recovery since neither it nor Pacific had complied with the provisions of the Revenue Act of 1936 governing claims for refunds of taxes paid under the former Act.[14] At no point in the answer was it al-

[12] 49 Stat. 1748, 7 U. S. C. §§ 647 and 648.

[13] 49 Stat. 1747, 7 U. S. C. §§ 644, 645 and 646.

[14] Respondent also set out as an affirmative defense that no refund could be had under the Agricultural Adjustment Act because that Act had been declared unconstitutional (R. 48).

leged that there was a variance between the claim for refund and the petition as amended.

Thereafter, on February 5, 1940, petitioner filed its First Amended Petition (R. 50-78) which, so far as here material, differed from the original petition (see p. 6, *supra*) and its amendment (see p. 7, *supra*) only in alleging that petitioner, as the sole shareholder of Pacific, became entitled on June 30, 1934, "to all rights, claims and choses in action" possessed by Pacific on that date "by operation of law, pursuant to a distribution in kind to it by Pacific" at that time. (R. 51). Pacific's assignments of June 30, 1934, and August 14, 1935 (see p. 4, *supra*), were set out at length "as physical evidence, affirmative proof and confirmation of this allegation" (R. 51-56). Prior to the filing of this "First Amended Petition", the parties stipulated that the original petition as amended might be "amended in the particulars as set forth in [petitioner's] First Amended Petition" and that respondent's answer to the original petitioner's amendment "shall in all particulars be deemed to be * * * an answer to [petitioner's] First Amended Petition in all particulars and with the same * * * effect * * * as though said answer was specific and particular answer to said First Amended Petition" (R. 78-79).

The trial (R. 185-262) consisted of little more than the submission (R. 189-190) of the Stipulation of Facts and the introduction of exhibits in evidence. However, in their opening statement, counsel for petitioner and respondent stated their views of the nature of the suit before the Court and issues arising therein. According to counsel for petitioner (R. 187-188) the suit was one for the recovery of an additional manufacturer's excise tax, and the issue was whether the words "processing tax" as used in the proviso of Section 9(a) of the Agricultural Adjustment Act (see n. 5, p. 3, *supra*) comprehended the "floor stock" tax imposed by Section 16 (a) of the same Act, *supra*. Counsel for respondent stated (R. 188-189), as to the issue suggested

y counsel for petitioner, that it was the contention of respondent that the "floor stock" tax was not a processing tax within the terms of the proviso to Section 9 (a). He stated further that it was the respondent's position that the suit was in fact one for the recovery of taxes paid under the Agricultural Adjustment Act and that the issue was whether petitioner had complied with the statutory and administrative conditions precedent to the maintenance of such a suit. Counsel for respondent did not suggest at any point in the trial that there was a variance in petitioner's claim for refund and petitioner's First Amended Petition.[15]

3. Decision of District Court. The two main questions considered in the decision of the District Court (R. 95-108) were: (1) Whether the additional manufacturer's excise tax was erroneously collected from Pacific. (2) Whether petitioner was entitled to recover the tax collected from Pacific. On the first question the Court concluded that the tax had been erroneously collected (R. 95-101); on the second, that petitioner was not entitled to recover[15a] (R. 101-108).

Before concluding that petitioner could not recover, the District Court, *ex mero motu*, raised and determined (R.

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[15] Nor did the trial brief submitted by respondent raise the question of variance. In fact, respondent conceded in its brief before the Circuit Court of Appeals (p. 26, n. 12) that the question of variance "was not urged by the Government in the court below."

[15a] The Court made three subsidiary holdings in support of its main holding on this question: (1) Petitioner's right to the refund depended upon Pacific's assignments of June 30, 1934 and August 14, 1935, which, since Pacific's claim had not been allowed, its amount determined and warrants for its payment issued, were void under R. S. § 3477, *supra* (R. 103-105; cf. Conclusion of Law V, R. 155-156). (2) Petitioner was not, within the terms of Section 621 (d) of the Revenue Act of 1932, 49 Stat. 267, 26 U. S. C. § 3443(d), governing claims for refunds of manufacturer's excise taxes collected under the Act, "the person who paid the taxes" (R. 106; cf. Conclusion of Law VI, R. 156). (3) Petitioner's evidence did not satisfactorily establish, as required by Section 621 (d), *supra*, that the taxes and suit had not been included in the prices charged for the tires assessed. (R. 107-108; cf. Conclusion of Law VII, R. 156).

102-103) a question of a variance between petitioner's claims for refunds and its First Amended Petition. On this point the Court initially stated that the First Amended Petition varied from the claims for refund because in the latter petitioner's right to maintain its suit for the recovery of the taxes was predicated on Pacific's assignment of June 30, 1934, while in the former it was predicated on petitioner's ownership of Pacific's stock in addition to the assignment of June 30, 1934. The Court stated further that the variance was occasioned, not by failure to comply with the statute (R. S. § 3226, as amended by Section 1103(a) of the Revenue Act of 1932, 47 Stat. 286, 26 U. S. C. § 3772 (a)(1) (see p. 23, *infra*)) requiring that a claim for refund be submitted to the Commissioner prior to the institution of suit, but by failure to comply with the Treasury Regulation requiring that claims for refund state in detail each ground upon which they are founded together with facts sufficient to appraise the Commissioner of the exact basis of the claim.[16] The Court also noted that the Commissioner appeared to have rejected petitioner's claim on the "broad ground that no right for refund existed in [petitioner]

[16] The District Court did not cite the Treasury Regulation upon which it relied in raising the question of variance. However, it is obvious that it had in mind T. R. 86, Art. 322-3 promulgated under the Revenue Act of 1934 (now T. R. 101, § 19.322-3) which provided that a claim for refund "must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof." This regulation, however, applied to income taxes only. Prior to November 12, 1935 (petitioner's original claim was filed on August 31, 1935) T. R. 46, Art. 71 (promulgated under the Revenue Act of 1932, but not published as Treasury Decision), provided, in so far as here material, that claims for refunds of excise should contain "the reason for claiming the . . . refund" and establish that the tax was not included in the sales price of the article assessed. On November 12, 1935 (petitioner's amended claim was filed on April 21, 1936) these provisions were removed from the Regulation (see *Shotwell Manufacturing Company* v. *Harrison*, 27 F. Supp. 422 (D. C. N. D. Ill.); T. D. 4605, Cum. Bull. XIV-2, pp. 386-388), and were not restored until August 16, 1938 (see T. D. 4853, Cum. Bull. 1938-2, p. 383, 387-388). These provisions appear in the present regulations (see 26 C. F. R. (1940 Supp.) § 316.94).

under the Commissioner's interpretation of Section 9 (a) of the Agricultural Adjustment Act" (R. 103). The Court then held, relying on *Tucker* v. *Alexander*, 275 U. S. 288, that respondent had waived the variance by its failure "to insist at any time upon the literal compliance with the regulations" (R. 103).

4. DECISION OF THE CIRCUIT COURT OF APPEALS. In its decision (R. 285-301), the Circuit Court of Appeals affirmed the judgment of the District Court on the sole ground that petitioner's First Amended Petition varied fatally from its claims for refund.

In reaching its decision, the Circuit Court of Appeals held (R. 295-298) that R. S. § 3226, *supra*, required that a claim for refund "identical"[17] with the claim upon which the suit is based be first submitted to the Commissioner of Internal Revenue as a condition precedent to the maintenance of the suit.[18] It also held (R. 299-300) that the Commissioner's

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[17] The Court said (R. 297):

> "The only logical conclusion that can be drawn from consideration of Section 3226 is that the claim for refund, which must be filed with the Commissioner as a condition precedent to maintain a suit for the recovery of the tax, is the identical claim upon which said suit must be based."

[18] In reaching this conclusion the Circuit Court of Appeals relied upon *United States* v. *Felt & Tarrant Manufacturing Company*, 283 U. S. 269, from which the Court quoted (R. 297-298) the following passages:

> "The claim for refund, which Section 1318 [of the Revenue Act of 1921, which was substantially the same as R. S. § 3226] makes prerequisite to suit, obviously relates to the claim which may be asserted by the suit. Hence, quite apart from the provisions of the regulation, the statute is not satisfied with the filing of the paper which gives no notice of the amount or nature of the claim for which suit is brought and refers to no facts upon which it may be founded." 283 U. S. at p. 272.)
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> "Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and 'they mark the conditions of the claimant's right'." (283 U. S. at p. 273.)

letter of rejection (see p. 6, *supra*) did not support the conclusion that the Commissioner had denied petitioner's claims for refund on the merits,[19] and thus waived a "lack of proper description of the assignment in the claim filed by petitioner" (R. 300).

Finally, the court held (R. 300-301) that respondent did not waive the variance at the trial of the case. On this point it said (R. 300):

> "It is also urged by Goodrich Company that the Government waived the form of the claim in the trial before the District Court. We do not agree. The Government demurred to the complaint on the very basis that the assignment was invalid and that the complaint therefore did not state a cause of action. The demurrer was overruled, and the Government answered the complaint; but in so answering, it did not lose its right to challenge the validity of the assignment, as disclosed by the claim."

QUESTIONS PRESENTED.

1. Whether R. S. § 3226 requires that the facts and grounds [redacted] relied on in a suit to recover taxes be *identical* with the facts and grounds set forth in a claim for refund.

2. Whether the Government may on the trial of a suit to recover taxes waive a variance, the subject matter of which could have been incorporated in an amendment to a timely claim for refund, even though the statute of limitations had run against original claims for refunds.

3. Whether the Government in the trial of the suit to recover the taxes waived the variance, if any, between petitioner's claims for refund and its First Amended Petition.

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[19] By the term "merits" the court meant the question whether respondent had collected the taxes in suit from Pacific under an erroneous interpretation of the proviso to Section 9 (a) of the Agricultural Adjustment Act, *supra*.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that R. S. § 3226 requires that the claim relied on in the suit to recover taxes be *identical* with the claim set forth in the claim for refund submitted to the petitioner.

2. In holding that the Government did not waive the variance, if any, between petitioner's claim for refund and its First Amended Petition.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The decision of the Court below raises a conflict of decisions among the Circuits. Independently of the conflict of decisions, the holding of the Court below raises an important question concerning the function of a claim for refund as a condition precedent to a suit to recover taxes.

The differences between petitioner's claim for refund and First Amended Petition in respect of the grounds and factual predicate stated to show its right to claim the taxes collected from Pacific are differences springing from an amplification of details and not from a change to unrelated grounds and supporting facts. In its claims for refund petitioner's ground in support of its right to claim the taxes was an assignment to it by Pacific of all the latter's claims and choses in action. In support of this ground it alleged Pacific's assignment of June 30, 1934. In its First Amended Petition, the operative ground[20] in support of its

[20] The statement that the distribution in kind resulted in ownership of the claim by operation of law not only was a conclusion of law, and thus surplusage, but also was unsupported by the facts alleged. That the District Court was aware of this is shown by its statement that the variance arose from the allegation in the first amended Petition that Petitioner was the sole owner of Pacific's stock (R. 102).

right to claim the taxes was a distribution in kind to it of all of Pacific's claims and choses in action. In support of this ground, it alleged that it was the sole owner of Pacific's stock and that the assignment of June 30, 1934,[21] which was set out at length, was made as a distribution in kind to it of all of Pacific's claims and choses in action. Thus, the two grounds were not inconsistent or unrelated, but germane,[22] the ground of the petition[23] springing from the ground of the claim when viewed in light of two additional facts which were not inconsistent with the factual predicate of the claim. In view of the nature of the differences between the claim for refund and the First Amended Petition in respect to the variance which the Court below held to be fatal, it is obvious that a literal meaning must be given to the Court's holding that the claim on which a suit to recover taxes is grounded must be "identical" with the claim asserted in the claim for refund; that is to say, the Court must be taken to have held that a claimant suing to recover taxes is limited to the precise grounds and facts of its claim for refund. This stringent holding gives rise to a conflict of decisions among the Circuits.

If it were true that the claim in suit must be thus identical with the claim stated in the claim for refund, the Third Circuit could not have held in *Bethlehem Baking Co.*

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[21] The assignment of August 14, 1935, as stated by the District Court (R. 102) had no operative significance over the assignment of June 30, 1934.

[22] This distinguishes the instant case from *United States* v. *Felt and Tarrant Company*, 283 U. S. 286, upon which the Court below relied (see page 11, *supra*) in holding that a claim for refund must be identical with the claim submitted in a suit to recover taxes.

[23] A distribution in kind of its assets by a corporation to its stockholders is sufficient to transfer the corporation's claims for refunding taxes, such a transfer not being rendered void by R. S. § 3447, *supra*. *Novo Trading Company* v. *Commissioner*, 113 F. (2) 320.

v. *United States*, 129 F. (2d) 490, 493,[24] that a taxpayer may, in support of a suit to recover taxes, introduce evidence not submitted to the Commissioner in the taxpayer's claim for refund. Similarly, the Fifth Circuit could not have held in *Bass* v. *Hawley*, 62 F. (2d) 721, 724, that the discrepancy between the amended pleading and the claim for refund was "but a difference in detail, not calculated to occasion a surprise"; nor could the same Court in *Snead* v. *Elmore*, 59 F. (2d) 312, 314, when determining the limits of permissible variation between the claim in suit and the claim stated in the claim for refund, have stated that it was not necessary that "the claim for refund must have contained all the evidence and argument that is offered in suit," but only "the substantial grounds" and "the general facts supporting the grounds," "so that they may be fully investigated." And the Sixth Circuit could not have held in *Lucas* v. *Fidelity and Columbia Trust Co.*, 89 F. (2d) 945, 947, that the terse claim for refund submitted by the Trustee of Ewald's estate was in "substance" the basis of the Trustee's suit in the lengthy and complicated litigation following the Commissioner's review of the claim.

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[24] This case was decided under Sections 903 and 904 of the Revenue Act of 1936, 49 Stat. 1747, 7 U. S. C. §§ 644, 645, governing claims for recovery of floor stock taxes paid under Section 16(a) of the Agricultural Act, *supra*, and suits to recover the taxes in the event of a rejection of the claim for refund by the Commissioner. Section 903 provides that "No refund shall be • • • allowed • • • unless • • • a claim for refund be filed by such person in accordance with Regulations prescribed by the Commissioner with the approval of the Secretary." Section 904 provides that no suit shall be brought before the expiration of eighteen months from the filing of the claim with the Commissioner, unless he render a decision within that time; or after the expiration of two years from the Commissioner's rejection of the claim. Thus the requisites provided for the recovery of a floor stock tax by suit are the same as those provided for the recovery of other taxes by R. S. § 3226, *supra*. It was the Congressional intent that they should be. Cum. Bull. 1939-1 (Part 2) (S. R. 2156, 74th Cong., 2nd Sess.), pages 699-700. It follows that Sections 903 and 904 are in *pari materia* with R. S. § 3226 in so far as the question of the sufficiency of a claim for refund to support a suit to recover taxes is concerned.

Independently of the conflict of decisions, the holding of the Court below raises a question of importance concerning the function of a claim for refund as a condition precedent to a suit to recover taxes.

It is, of course, undoubted that a claim for refund is a condition precedent to a suit to recover taxes (*United States* v. *Kales*, 314 U. S. 186, 193). But is it, as would follow from the rigorous holding of the Circuit Court of Appeals, a condition precedent in the sense that a suit to recover taxes is limited to the precise grounds and facts of the claim, thus making the suit no more than a judicial review of the precise statement of the case as in the claim for refund? This, obviously, is not so, for a suit may be brought on grounds not stated in the claim for refund in the event of a waiver by the Government (*Tucker* v. *Alexander*, *supra*, pp. 230-231). Also, a formal claim for refund is not even a requisite to a suit to recover taxes, if the Commissioner, on the basis of an informal claim, defective for lack of particularity, has investigated the grounds urged in the suit to recover taxes (*Bonwit Teller and Co.* v. *United States*, 283 U. S. 258, 265; *United States* v. *Kales*, *supra*, p. 197). Again, new facts may be asserted on the suit if they do not occasion surprise on the part of the Government (*Bass* v. *Hawley*, *supra*, p. 724). These cases, and others, suggest the true function of a claim for refund as a condition precedent to the maintaining of a suit to recover taxes. That function is to invite (*Snead* v. *Elmore*, *supra*, p. 314) and facilitate (*Tucker* v. *Alexander*, *supra*, p. 321), in the interest of a proper administration of the revenue (*United States* v. *Felt and Tarrant Company*, *supra*, p. 272), investigation (cf. *United States* v. *Garbutt Oil Company*, 302 U. S. 528, 532-533; *United States* v. *Andrews*, 302 U. S. 517, 524) by Government officials of the grounds and facts supporting the rights asserted by claimants seeking to recover taxes, to the end that errors made by the officials may be corrected without the necessity of litigation, and, if that is impossible, to aid the officials to prepare for the trial of the

suit to recover taxes (*Tucker* v. *Alexander, supra,* p. 314; *A. G. Reeves Steel Company* v. *Weiss,* 119 F. (2) 472, 476).

Viewed in this light, petitioner submits that the sufficiency of a claim for refund as a condition precedent to a suit for recovery of taxes is not to be judged alone by a comparison of the precise grounds and facts stated in each, but in terms of broader considerations, among which would be: Did the claim adequately put the Commissioner on notice as to the fact of the claim and its general nature, pointing to the factual basis? Did the claim for refund initiate an investigation by the Commissioner which substantially disclosed the grounds and supporting facts relied on in the suit? Would the claim have initiated such an investigation but for the fact that the Commissioner denied the claim for reasons not touching the grounds and supporting facts stated therein? Did a failure to set forth the grounds and supporting facts in detail mislead the Commissioner in his consideration of the claim, or occasion surprise on the part of the Government on the suit to recover taxes, materially impeding its defense? Is the difference between the claim before the Commissioner and the claim in suit one of kind or of detail?

Without elaborating at length, petitioner submits that a major part of these considerations are operative and controlling in the instant case. The Commissioner was fairly put on notice of the nature of petitioner's claim; he was advised of both the substantive and procedural contention involved.[25] Any investigation of the merits of petitioner's asserted right to claim a refund of the taxes would have concerned the authority of Pacific's President and Secretary to execute the assignment relied on in support of that right, and the record showing this authority (see p. 4, *supra*) also disclose the details constituting the difference between the claim and the First Amended Petition: that petitioner was the sole stockholder of Pacific and that as-

[25] That is, the Commissioner was informed of the contention that the tax had been illegally collected from Pacific and of the contention that petitioner was entitled to recover it.

signment was made as a distribution in kind of all of Pacific's claims and choses in action. Thus, the transaction of which notice was given in the claim for refund pointed unerringly to the details added on suit. The failure to set them forth did not in any way impede the Commissioner's considerations of the claim, for his consideration did not, as the letter of rejection (see p. 6, *supra*) shows, involve the procedural contention. Nor was the Government surprised at the trial, for it readily stipulated that the pleading containing the added details might be filed, and neither then nor later objected on the ground of surprise.

Petitioner respectfully submits that it is of importance to the rights of taxpayers that the holding of the court below be examined by this Court. If it is true, as would follow from the holding of the court below, that a technical variance between a claim for refund and a claim advanced in a suit to recover taxes precludes the taxpayer's right of recovery, it will be necessary for a taxpayer to abandon the practice of considering a claim for refund as a means of directing the Commissioner's attention to the grounds and facts in support of the taxpayer's asserted right which need to be investigated, and to consider a claim for refund in the nature of a case made before an administrative agency in preparation for judicial review, necessitating a laborious exposition of grounds and the setting forth of multitudinous evidence. It goes without saying that if the flexible procedure formerly thought to obtain must be abandoned, the proceeding on a claim for refund will indeed become "a trap for the unwary."

II.

The novel question is presented whether the Government may waive a variance, the subject matter of which could be made the subject of an amendment to a timely claim for refund after the statute of limitations on original claims has run.

Petitioner has urged above that the opinion of the Circuit Court of Appeals raises a question of importance concerning the function of a claim for refund as a condition precedent to a suit to recover taxes. Subsumed in this argument is the contention that petitioner's claims for refund did not vary fatally from its First Amended Petition. Petitioner will contend below that if there was a variance, the decision of the Court below that it was not waived by the Government is in conflict with the decision of this Court in *Tucker* v. *Alexander, supra,* on the question of what constitutes a waiver of a variance by the Government. However, before this question can be reached, it is necessary to consider a question not determined by the Court below; namely, the question whether the variance could be waived by the Government. This question in turn presents the novel question whether the Government on the trial of a suit to recover taxes may waive a variance, the subject matter of which could be added by an amendment to a timely claim for refund after the statute of limitations against original claims has run.

In *Tucker* v. *Alexander, supra,* this Court held that the variance between the grounds of Tucker's claim and the grounds of his suit had been waived. In doing so it pointed out that at the time of the waiver the statute of limitations had not run against the claims for refunds with respect to the taxes in suit, and hence the waiver of the variance did not constitute a waiver of the statute of limitations on claims for refund, but only of the statute requiring that a claim for refund be filed with the Commissioner prior to the institution of suit. It is true that in the instant case the variance concerned arose after the statute of limitations

(see n. 9, p. 5, *supra*) against claims for refunds had run. However, petitioner submits that the difference does not control; that if there was a waiver in the instant case, it was a waiver of the statute and regulations requiring that a claim for refund be filed, and not a waiver of the statute of limitations against refunds.

Though the statute of limitations had run on new claims for refund in respect of the taxes which petitioner sought to recover, and though petitioner's claims had been rejected, they were still susceptible of amendment if the Commissioner should reopen the case, provided that the facts upon which the amendment was based would have been ascertained by the Commissioner in determining the merits of the original claim (*Pink* v. *United States*, 105 F. (2d) 183, 187). The permission to file such an amendment, of course, does not involve a waiver of the statute of limitations against refunds. Accordingly, if a variance consists of matter which, with the Commissioner's permission, could have been included in an amendment to a timely claim for refund, a waiver by the Government of a claimant's failure to submit the subject matter of the variance to the Commissioner by proper amendment would not constitute a waiver of the statute of limitations against claims for refund, but, as in the case of *Tucker* v. *Alexander*, a waiver of the statutory requirement that the claim sued on be first submitted to the Commissioner.

It remains to show that the rule here contended for by petitioner has application to the facts of the instant case. This, in sum, resolves itself to showing that the subject matter of the so-called variance would have been ascertained by the Commissioner if he had investigated the merits of petitioner's claim that it was entitled to recover the taxes paid by Pacific by virtue of the latter's assignment of June 30, 1934. This, petitioner submits, is made obvious by a line of reasoning stated elsewhere in this petition; that is, that the first disclosure of such an investigation would have been the records showing the authority of Pacific's President and Secretary to execute the assign-

ment, and that these records would have shown the subject matter of the alleged variance: that petitioner was the sole owner of Pacific's stock and that the assignment was a distribution in kind.

III.

The decision of the Court below on the question of whether the Government waived the variance on the trial conflicts with the decision of this Court in Tucker v. *Alexander, supra.*

On the trial of the *Alexander* case, Tucker abandoned the grounds stated in his claims for refund and asserted a new one. The Government neither objected to the resulting variance nor in words waived it, but proceeded to meet the new ground with argument and evidence. Toward the end of the trial counsel for the Government and Tucker stipulated orally (see p. 24, *infra*) the amount to which Tucker would be entitled if the Court should find in his favor on the new ground urged at the trial. In view of the failure on the part of counsel for the Government to raise the question of variance during the trial and of his entering into the stipulation, this Court held that the Government had waived the variance.

The source of the variance which the Court below held to be fatal was petitioner's allegation in its First Amended Petition that it was the sole owner of Pacific's stock and its allegation that the assignment of June 30, 1934, was a distribution in kind. Counsel for the Government did not, however, object to the filing of this pleading; in fact, he entered into a stipulation that it should be filed, and in doing so he raised no question of variance. Furthermore, he did not amend the Government's answer to raise a question of variance, but left it to stand as it was when under the pleadings of petitioner there could have been no grounds upon

which to raise a question of variance,[26] and neither in his oral statement to the Court concerning the issues involved in the case, nor in the brief which he submitted to the trial Court for the Government, did he raise a question of variance.

Petitioner submits that the conduct of counsel for the Government in the instant case affords equally as clear a waiver of the variance as did the conduct of counsel for the Government in the *Alexander* case, and that the holding of the Court below that the variance was not waived is obviously in conflict with the decision of this Court in the *Alexander* case on the important question of what constitutes a waiver of a variance by the Government in the trial of a suit to recover taxes.

CONCLUSION.

Petitioner respectfully submits that a writ of certiorari should issue.

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[26] The court below placed its holding (see p. 12, *supra*) that the Government did not waive the variance at the trial on the grounds that the point had been saved by the demurrer (see p. 7, *supra*) which the Government interposed to petitioner's original petition as amended (see pp. 7, 8, *supra*). The variance, however, arose only upon the filing of the First Amended Petition (see p. 8, *supra*). Since a demurrer only raises the sufficiency of the pleading to which it is directed, it is obvious that this holding of the court below is erroneous. Furthermore, the demurrer did not assert insufficiency, on grounds of variance, but only, in so far as here material, on the ground that the assignment of June 30, 1934, was void under R. S. § 3477, *supra*.

APPENDIX.

Statutes Involved

R. S. § 3226, as amended by Section 1103(a) of the Revenue Act of 1932, 47 Stat. 286, 26 U. S. C. § 3772(a)(1), reads in pertinent part as follows:

> § 3772(a)(1).—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

R. S. § 3477, 31 U. S. C. § 203, reads as follows:

> § 203.—*Assignments of claims void.* All * * * assignments made of any claim upon the United States * * * shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such * * * assignments * * * must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer. * * *

Section 602(1) of the Revenue Act of 1932, 47 Stat. 261, 26 U. S. C. § 3400, reads as follows:

> Section 602.—There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:
>
> (1) Tires wholly or in part of rubber, 2¼ cents a pound on total weight (exclusive of metal rims or rim bases), to be determined under regulations prescribed by the Commissioner with the approval of the Secretary.

Section 16(a) of the Agricultural Adjustment Act of 1933, 48 Stat. 40, 7 U. S. C. § 616(a), provides in pertinent part as follows:

> § 616.—(a) Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:
>
> (1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date. • • •

Stipulation In Tucker v. *Alexander*, 275 U. S. 228.

Mr. Toomey [Counsel for Government]:

> I think at this time we can simplify this case a little bit by making a stipulation here. It is stipulated that the value of the stock at March first, 1913, including the real estate and the dividends which were subsequently taken out based upon the net worth of the corporation was $356.86 per share. That is the figure used by the revenue agent. It is also agreed that if the Government is correct in reducing the March first value by the amount of this real estate and the dividends, that that valuation per share will be reduced $153.15, leaving a net March first value per share of $203.71. *I believe it is also agreed* that at the date of liquidation the assets of the corporation valued upon the same basis, the stock was worth $319.42 per share, *that if the court should hold that the Government is wrong in its method of computing* the March first, 1913, value, hold we were wrong entirely, that *the plaintiff is entitled to judgment for $6,642.13*, the maximum of the recovery will be only $6,642.13. The correct means of treating the $216.26 will be reserved for the determination of the Court.

Mr. Garnett [Counsel for Tucker]:

It is understood that if the Government is wrong as counsel has stated to the handling of the dividends the amount refunded of taxes will be $6,642.13.

Mr. Toomey: *Yes, sir.*

Mr. Garnett: With interest from date of payment at six per cent and if the Court should hold that the refund of $216.26 which the Commissioner has announced in the letter the taxpayer is entitled to will not be included in the judgment, then that will be deducted from the total amount so refunded.

The plaintiff reserves and by this stipulation does not waive the question of whatever benefit he may have on goodwill value shown to have existed March first, 1913, and also existed at July 1920, but which the plaintiff contends is not distributable to the stockholders on liquidation. (See Record in No. 167, October Term 1927, pp. 64-65.) (Italics supplied)